The Central Law Journal.

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CURRENT EVENTS.

A NATIONAL CODE OF PROCEDURE.—At the last session of Congress, a petition, of a number of lawyers and business men of the State of Missouri, asking for the appointment of a commission to prepare a national code of procedure, was presented to the Senate by Mr. Cockerill, referred to the committee on the judiciary, and ordered to be printed. The proponent of the measure was Samuel B. Gordon, Esq., of the St. Louis Bar, a gentleman of learning and experience, who has bestowed considerable reflection upon the subject. Appended to the memorial are some remarks of his, which we subjoin: "The need of such a code is obvious; since, under the present statute, the practice of the Circuit Courts of the United States in actions at law must conform to that in the courts of the particular State; whereas, if a Federal code of procedure were established, uniform in all cases, whether at law or in equity, or admiralty, the legislatures of the States would, in course of time, conform their respective codes of practice to it, and thus we should finally have a uniform system of legal procedure throughout the United States. The subject of codification will come up for sharp discussion at the next meeting of the American Bar Association, and this feature of it will be well worthy of consideration."

PROSECUTION OF INFAMOUS CRIMES.—The decision of the Supreme Court of the United States, in *Ex Parte Wilson*,[1] promises to work the immediate discharge of a good many offenders now in prison under sentences for infamous crimes, who were prosecuted by information, and to make more difficult the prosecution of certain classes of offenders against Federal statutes. Under this decision, selling whiskey without a Federal license is understood to become an infamous crime; since § 3242 of the Revised Statutes of the United States provides that it shall be punished by a fine of not less than $100 or more than $5,000, and imprisonment for not less than thirty days or more than two years. But the decision will work no practical harm, except to the United States district attorneys and marshals; for grand juries will always indict in cases of plain violations of the law. On the contrary, it is unquestionaby sound in principle and favorable to public right; since it will put a stop to those oppressive prosecutions which some of the district attorneys have been in the habit of instituting, for the mere purpose of raising fees, where there had been no more than a technical violation of the law.

DISTRESS FOR RENT.—We see from the case of *Waring v. Slingluff*,[2] that they still have in Maryland, the common law abomination of distress for rent, though hedged about with some restraints which make it a more dangerous and difficult pastime for the landlord than in ancient times, when he could distrain any body's cattle that happened to be in his tenant's field, whether they belonged to the tenant or to a stranger. Distress for rent is an infamous procedure, which came into vogue when England was run by landlords, when the tenant was but one grade above the villein, and had but few rights which the landlord was bound to respect. It was a kind of legal process by which a man acted as judge, jury and sheriff in his own case; tried the matter in controversy between himself and his tenant, rendering judgment in his own favor, and levying execution, either upon the tenant's or upon some one else's cattle, without giving the tenant any notice of the proceeding, except such as he might acquire by ocular demonstration, if he happened to be at home and saw the cattle driven off. It was a case in which the common law (let us not forget to call it the "wisdom of ages") allowed a man to be a judge in his own case, to render a judgment in his own favor, and to execute the judgment, without giving the other party any notice; and all this in the face of the solemn declaration of Magna Charta, that "No man shall be taken or im-

[1] Ante p. 28.

[2] 63 Md. 53. (Adv. Sheets.)

prisoned, or deprived of his freehold, his liberties, or privileges, or exiled or outlawed, or *otherwise destroyed*, but by the judgment of his peers and the law of the land." This provision, we presume, exists in the constitution of Maryland, and the infamy of distress for rent exists in her law. It is said that large bodies move slowly. In American jurisprudence the rule is reversed: the smallest States stick longest to the old abominations. Maryland still has distress for rent; Delaware has the whipping post, and Rhode Island was the last American State to abolish imprisonment for debt.

MR. HENDRICKS' ADDRESS AT THE YALE LAW SCHOOL.—At the recent commencement of the Yale Law School, the Hon. Thomas A. Hendricks, Vice President of the United States, delivered an oration on "The Supreme Court of the United States and the Influences that have contributed to make it the Greatest Judicial Tribunal of the World," One rises from the perusal of it with something of a feeling of disappointment. If it had been pronounced by any one other than a statesman of reputation, holding a high official station, it would not be regarded as a very strong performance. There is but one idea in it, and that is that the Supreme Court of the United States, by reason of the fact that the decision of great constitutional questions is committed to it, wields more power than any judicial tribunal in the world. It is couched in a tone of such excessive adulations, that, if Mr. Hendricks had not a character as a lawyer which forbids such a suspicion, one might think that he was trying to get himself *rectus in curia*, or, to translate it into American, "solid with the court." There is not in it one word of criticism, nor any suggestion of improvement, except the hint that it was perhaps unwise for the framers of the constitution to leave it to Congress to fix the number of judges. Every one can see that it was unwise. The power of the Congress, with the aid of the President, to pack the court for partizan purposes exists and has been exercised. It can be done almost as effectively as the "Government" in England can change the political complexion of the House of Lords by creating new peers. The court and its judges in the main deserve high eulogy. But it cannot escape attention that it rendered the Dread Scott decision, which the American people reversed upon a hundred battle fields; that, the constitution having empowerd Congress to provide for the coining of money, the court decided, a year ago, that Congress could authorize the coining of it out of green paper; and that but a few weeks before this oration was pronounced, the court, by a bare majority, rendered a monstrous decision, which places the most venerable State in the Union at the feet of the Federal district judges. Mr. Hendricks' idea, carried out as it is not in his oration, would suggest the remodeling of the court, so as to lop off all that portion of its jurisdiction which might as well be committed to other appellate tribunals, and leave to it only the decision of constitutional questions and questions of public law. The truth is, our Federal judicial machinery has become totally inadequate for the work it has to do. We ought to have, besides the Supreme Court of the United States, five special courts of appeal: one for civil causes at common law; one for equity causes; one for admiralty, and maritime causes; one for patent causes; and one for criminal causes. The Supreme Court ought to be clothed with a larger superintending jurisdiction over inferior tribunals. It ought to be able to reach some of the abuses in those tribunals, like railway receiverships, which go unredressed, and which smell to heaven.

NOTES OF RECENT DECISIONS.

MORTGAGE [ACCOUNTING.]—PRINCIPLES ON WHICH A MORTGAGEE IN POSSESSION MUST ACCOUNT IN EQUITY.—In *Booth v. Baltimore Steam Packet Co.*,[3] the Court of Appeals of Maryland, in an opinion delivered by Alvey, C. J., state the principles on which an account in equity will be stated between a mortgagee in possession and the mortgagor, as follows: "As between the mortgagor and mortgagee, where the latter is in possession in the acknowledged character of mortgagee, the prin-

[3] 63 Md. 39 (Adv. Sheets.)

ciples of the account are plain and well defined, and are applied for the mutual benefit of both parties. But where the possession is held adversely to the mortgagor, with denial of the right of redemption, the principles of the account are quite different, and are applied with more or less rigor against the wrong-doer, according to the circumstances of the case. In the ordinary case for redemption, where the mortgagee is in possession, acknowledging his true relation to the property, he is required to account for all issues and profits thereof, so that they may be applied, after deducting all reasonable expenses and allowances, towards the discharge of the debt and accrued interest. The usual decree in such cases, against the mortgagee in possession, is for an account of what he has received, or what he might have received without his own wilful default.[4] The duty of the mortgagee in possession is well stated by Lord Justice Turner, in Kensington v. Bouverie,[5] where he says, a mortgagee, when he enters into possession of the mortgaged estate, enters for the purpose of recovering both his principal and interest; and, the estate being, in the eye of this court, a security only for the money, the court requires him to be diligent in realizing the amount which is due, in order that he may restore the estate to the mortgagor, who, in the view of this court, is entitled to it. It is part of his contract that he should do so. See also Mayer v. Murray.[6] By taking possession the mortgagee assumes the duty of treating the property as a provident owner would do. He is bound to keep it in good ordinary repair, or, as some of the cases put it, to keep it in necessary repair. Godfrey v. Watson;[7] Sandon v. Hooper.[8] And for all such proper or necessary repairs placed upon the property by the mortgagee he is entitled to receive allowance in the settlement of his accounts, and the amount so allowed will be added to the principal of the mortgage debt, if not liquidated by the rents and profits charged.[9] Such are the principles of accounting as been the mortgagor and the mortgagee in possession, where the character of mortgagee is acknowledged by the latter. But where the mortgagee in possession repudiates his character and true relation to the property, and claims to hold as real, absolute owner, and denies all right of redemption, he renders himself liable to be treated as a wrong-doer, and as having acted in fraud of the rights of the mortgagor. In such case, it is an attempt to pervert a transaction from its real nature and design, and to give it an effect contrary to the real intention of the parties; and such an attempt is stigmatized by a court of equity as fraudulent.[10] And the consequence attending such attempted perversion of the transaction is most serious to the mortgagee. He thereby disentitles himself to be treated with the favor of a mortgagee in possession as such, but is treated as a wrong-doer from the time of the disclaimer or repudiation of his true character. As an authority for, and in illustration of this principle, we may refer to the case of the Incorporated Society v. Richards.[11] In that case the Chancellor, Lord St. Leonards, was pressed to give to the defendant the advantages of a mortgagee, in an ordinary suit for redemption, to which he replied: 'This is a peculiar case, and cannot be treated as the ordinary case between mortgagee and mortgagor. Here you set up a title adverse to the owner; and when a creditor denies his character as such, and claims as owner, I cannot allow him to fall back on his original character of creditor, as if he had never departed from it. I will never allow a party, who has put the owner at arm's length, to turn round, when defeated, and claim all the benefits attached to the character of a fair creditor.' The same principle was adopted and applied in the decision of the case of the Bank of Australasia v. United Hand-in-Hand Co,,[12] by the judicial committee of the privy council. In that case it was held that because the mortgagee set up title to the mortgaged property adverse to the mortgagor and in denial of the right of redemption, he lost the immunities of an ordinary mortgagee, and was held to account as for a wrongful possession.''

[4] Mayer v. Murray, 8 Ch. Div. 424, 428; 2 Fisher on Mort. (3d. ed.) 943.
[5] 7 De G., M. & G., 134, 157.
[6] *Supra.*
[7] 3 Atk., 518.
[8] 6 Beav., 249.
[9] Godfrey v. Watson, *supra*; Moore v. Cable, 1 John. Ch. 388.
[10] Russell v. Southard, 12 How, 148.
[11] 1 Dr. & War. 334.
[12] 4 App. Cas. 391, 408.

WAREHOUSE RECEIPT. [MISDEMEANOR.] — RECEIPT FOR ONE'S OWN GOODS TO REMAIN IN HIS OWN POSSESSION NOT A WAREHOUSE RECEIPT.—A statute of Maryland makes "bills of lading, warehouse, elevator, or storage receipts" negotiable; prohibits the delivery of the goods for which such instruments are issued, except to the party to whom they are issued, and makes a violation of the prohibition a misdemeanor.[13] In *State v. Bryant*,[14] the Court of Appeals of Maryland hold that the following instrument was not embraced within the terms of this statute:—

"No. Woodwardsville, Md., Nov. 2nd, 1883.
Received on storage, in my canning house, from E. B. Mallory & Co., seventeen hundred and twenty cases 3X tomatoes, my own packing. Deliverable to order of E. B. Mallory & Co., only on production of this receipt, properly indorsed. 188—.
A. S. BRYANT & BRO."

Just why the court did so hold is not made clear by the opinion. The idea seems to be that the statute was intended to apply only to receipts issued by persons engaged in the business of carrying or storing goods *for others*. But it should seem that if the legislature intended that the meaning of the words should be thus restricted, it would have said so. It may be very necessary for a man who makes goods and who keeps a warehouse in which he stores them, to borrow money on a pledge of them; and why, in order to issue a valid statutory "storage receipt" for them should be required to carry them off to another man's warehouse, unless the statute says so? If a man has a warehouse or a storehouse, and issues such a receipt for goods to a man who advances money on them, why does he not make himself a warehouseman *pro hac vice*, and why is not such a receipt a warehouse receipt? The Maryland court seem to think that some dreadful thing will happen if the statute is read so as to embrace that which is within the literal meaning of its terms; but the Kentucky legislature did not think so when they made their statute expressly extend to such a case.[15] "Such a construction," says Robinson, J., in giving the opinion of the Maryland court, "which declares that no sale of personal property of which the vendor remains in possession, shall be valid except as between the parties, unless by a bill of sale or mortgage duly executed and recorded; and would destroy the safeguards, which the law has wisely thrown around the sales of personal property, for the protection of purchasers and creditors. No act ought to be construed as making so sweeping an innovation, unless the intention of the legislature is expressed in plain and unambiguous terms." Suppose it does repeal the previously existing law relating to sales of personal property, what then, so long as it is done to facilitate commerce? The Maryland court do not point out wherein it would destroy any safeguards which the law has thrown around the sales of personal property.[16] It was a weak opinion, and Alvey, C. J., dissented.

[13] Md. Act of 1876, ch. 262, § 1.
[14] 63 Md. 66 (adv. sheets).
[15] See Cochran v. Ripey, 13 Bush, (Ky.) 495.

[16] The Maryland court say that the following cases do not support the contrary conclusion: Greenbaum Bros. & Co. v. Megibben, 10 Bush, Ky. 419; Cochran & Fulton v. Ripy, Hardie & Co., etc., 13 Bush, 495; Bradwell v. Howard, 77 Ill. 305; Price v. The Wisconsin Marine and Fire Ins. Co., 43 Wis. 267; Merchants & Manufacturers Bank, etc. v. Hibbard, 48 Mich. 123; Van Schoonhoven v. Curley, 86 N. Y. 187; Tiedeman v. Knox, 53 Md. 614.

GRAND JURORS AS WITNESSES.—STATUTORY PROVISIONS.

The question as to the competency of grand jurors as witnesses, concerning matters before them, is one that admits of a wide range of discussion; but in this paper the discussion will be limited, strictly, to the effect of statutes which enumerate the cases in which grand jurors may be called as witnesses. At common law a member of the grand jury was not permitted to testify as to what had been the testimony of witnesses examined before them; and under the earlier decisions of the country the oath of the grand juror was regarded as enjoining the strictest secrecy, but later decisions have modified this rule to a great extent.

It is the burden of this article to maintain the conclusion, that when statutes prescribe the case or cases in which grand jurors may testify, that they can do so in no other.[1]

[1] Thompson & Merriam on Juries, 745; Spratt v. State 8 Mo. 274; State v. Bebee, 17 Minn. 241; *Re.* Pinney, 27 Minn. 281; State v. Gibbs, 39 Iowa 318; Beam v. Link, 27 Mo. 261; Tindle v. Nichols, 20 Mo. 326; People v. Hulbut, 4 Denio 135; *Ex parte* Sontag, 5 Crim. Law

"Some of the earlier decisions in this country," says a learned law editor, "would seem to indicate a disposition to prevent any disclosure, by a grand juror, of what a witness had testified in his examination before the grand jury; or, where a statute permitted such disclosure in any case, to construe the statute in the strictest manner."[2] It is a matter worthy of note that statutes of the several States that now have statutes upon this subject at all, are nearly, if not quite, the same in phraseology and are the same in meaning and effect. The Iowa statute is a fair sample of all the statutes upon the subject.[3] The Iowa statute has a section in the usual form enjoining secrecy. In State v. Gibbs,[4] a grand juror was called to testify, in chief, as to statements of Gibbs made before the grand jury of which the witness offered was a member. Justice Miller delivering the opinion of the court, after a careful examination of the cases and referring to the statute says: "The statute also provides for the only disclosure a grand juror is permitted to make of the proceedings of the grand jury. He may be required to disclose the testimony of a witness examined before the grand jury for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or, to disclose the testimony given before them of a witness upon a charge of perjury against him. Code. Sec. 4285. This statute provides the only occasions upon which it is lawful or permissible for a grand juror to disclose the testimony of a witness given before that body."

In Pindle v. Nichols,[5] the action was for slanderous words spoken by the defendant of and concerning plaintiff's wife. The alleged slander consisted in the statement that the plaintiff's wife, as a witness before the grand jury, had sworn falsely in a matter under investigation. The defendant introduced grand jurors to prove the truth of his statement, and the presiding judge required them to testify against the objection of plaintiff. The court after citing the statute says, "Thus stands the statute law. In what cases, then, can a grand juror be lawfully required to testify as a witness in relation thereto? Such as are embraced in the 15th section cited above, and such only. This 15th section specifies these cases and the bare specification excludes all other cases not enumerated. * * * These are the cases where a grand juror may be lawfully required to testify and are the only cases."[6] *In re* Pinney,[7] the testimony of a witness, who was a member of the grand jury that found the bill against defendant was excluded on the ground of incompetency; and the court said that evidence of what he testified before the grand jury was properly excluded; and that "the only cases in which the testimony of a witness may be disclosed are those specified in the General Statutes (1878), c. 107, § 41."[8]

In Ruby v. State,[9] a material witness for the State was sought to be impeached by showing contrary statements before the grand jury. It was objected to, and the objection sustained. "Under the common law," says the court, "and our code prior to the act of 1875 this would have been a proper predicate, because a witness could have been impeached

Mag. 384, s. c. 1 West Coast Rep. 588; Ruby v. State, 9 Texas App. 353.

[2] 1 Crim. Law Mag. 586. See note.

[3] McClains Annotated Statutes (1880) Sec. 4285. "A member of the grand jury may be required by the court to disclose the testimony of a witness examined before them for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or, to disclose the testimony given before them by any witness upon a charge against him of perjury.

[4] 39 Iowa, 318.

[5] 20 Mo. 326.

[6] Spratt v. State, 8 Mo. 247; Beam v. Link, 27 Mo. 261. "But this decision is based upon the Missouri Statute, which explicitly forbids such disclosure on the part of a grand juror." 2 Crim. Law Mag. 530. See note.

Missouri Statute, Sec. 1791, (R. S.) "Members of the grand jury may be required by any court to testify whether the testimony of a witness examined before such jury is consistent with or different from the evidence given by such witness before such court, and they may, also, be required to disclose the testimony given before them by any person upon a complaint against such person for perjury, or, upon his trial for such offence."

[7] 27 Minn. 280.

[8] Statute of Minn., chap. 107, § 41 (1878): "Any grand juror may, however, be required by any court to disclose the testimony of any witnesses examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witnesses before the court, or, to disclose the testimony given before them by any other person, upon a charge against him for perjury in giving his testimony, or upon his trial therefor."

[9] 9 Tex. App. 353; Texas Statute (1879), § 384, Crim. Code. "You solemnly swear * * * *; The States counsel, your fellows and your own you shall keep secret, unless required to disclose the same in the course of a judicial proceeding in which the truth or falsity of evidence given shall be under investigation * *."

in this manner. What effect has the act of 1875 upon this right? Is it restrictive in its nature, and therefore an abrogation of the old rule? * * * * We therefore conclude that the truth or falsity of the evidence was not drawn into the investigation in this judicial proceeding, and that the juror could not be made to disclose it. Article 384 specifies the cases in which the evidence is admissible, and the specification excludes all others." The case of Canton v. State,[10] regards the section of the statute merely as an oath, and does not regard it as a restrictive statute, and therefore overrules Ruby v. State,[11] and cites, in support of the position taken, Wharton on Criminal Evidence,[12] which must be considered to be the law where no statute intervenes to the contrary. The citation in Wharton is fatal to the position taken by the court in Canton v. State, for that section says that it is the usual rule to call grand jurors whenever it is material to show what was the issue, before the grand jury, or what was the testimony of a particular witness, and the learned author in support of the general law, makes the declaration that such is the statutory law of New York and Massachusetts. This citation in Wharton only goes to sustain the position of this article; the very fact of New York and Massachusetts having such statutes is the reason that grand jurors can be called in such cases in those States.[13]

In *Ex parte* Sontag,[14] the petitioner was committed to prison by the Superior Court as being guilty of contempt in refusing to answer the question, whether he, as grand juror, voted for finding the indictment. The statutes of California,[15] in reference to the secrecy imposed upon grand jurors, is very like that of other States, with the addition of the exceptional clause, "section 926 specifies," says the court, "the exceptional cases in which a court may require a grand juror to disclose any matter transpiring in the jury room; * * * * and the inquiry must be confined to such matters."

In Proffatt on Jury Trials,[16] the author refers to the cases of State v. Gibbs, Tindle v. Nichols and Beam v. Link, as being decisions that carry the obligation of secrecy imposed upon grand jurors, "farther than is probably justified." But the author fails to show the cause of the new departure in those cases; and, to the casual reader of Proffatt, those cases would appear as standing alone, while, in fact, they are not departures, but expositions of statutes. Several of the States have recently adopted a similar statute, and upon which no case has been decided. In those States the rule of construction of such statutes will conform to the established principle of law which carries with the statute the construction made by the judicial authority of the State from which the copy originated.[17]

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[10] 13 Texas App. 139; s. c., 5 Crim. L. Mag. 147.
[11] *Supra.*
[12] § 510.
[13] People v. Hulbut, 4 Denio, 133; 2 Rev. Statutes (N. Y.), 724, § 31. "A grand juror may be required to testify whether the testimony of a witness given before them is different from that given in court, and to disclose the testimony of a witness on his trial for perjury; but cannot disclose votes or deliberations."
[14] 5 Crim. Law Mag., 384; s. c., 1 West Coast Reporter, 588, California S. C.
[15] § 926 Penal Code. See 5 Crim. L. Mag. 384.
[16] § 49.
[17] Skonton v. Wood, 2 Cent. L. J. 61.

AT ASSIZES.

A SKETCH ON THE CIVIL SIDE.

Of all the pleasant places that are studded throughout England, commend us to the "ever faithful city," beautiful Worcester, as the model of an Assize town. With its vast cathedral, ancient even in the days when King John was laid to rest therein, its queenly river, its broad, grassy race-course, its old rookeries, its modern factories, it combines in an unusual degree the excellences of the past and the present, and when we add to these attractions, an abundance of good hotels and Assize courts, large and well ventilated, it may be easily understood why we are speeding our way down there this morning to attend Assize. Dirty Stafford is nearer to our own district, but there the calender is always crowded, the courts are not fit to breathe in, and the hotels beneath contempt.

Arrived at Worcester, we find ourselves ahead of the judges, whose train is half an hour late, and, as nothing can be done till

they arrive, we secure our quarters at the "Hop-pole," and stroll down to the cathedral, to which we know the judges will straightway proceed, both their lordships being true sons of the church, and sure to attend the Assize sermon. Half an hour quickly passes in the familiar aisles, and then we hear the blare of trumpets outside, the great doors swing slowly open, the organ peals out the National Anthem, and her majesty's judges, in all the pomp and ceremony of State, accompanied by the high sheriff and his crew, pass up the broad nave, enter their stalls in the choir, and morning service begins. After the Te Deum and the anthem we make our escape, having no mind to listen to the string of platitudes which some reverend and rusty canon is about to inflict on his unfortunate audience. We repair to the Shire Hall, and pass the time in badinage with our *confreres* already there, till at last the judges come from church, go on the bench and "open the commission," a mystic ceremony performed with much antique solemnity, and supposed to be essential to the validity of all the proceedings at the Assize. No sooner is the commission opened than the minor officials begin business and we are at liberty to enter our cases. After a little delay we get our cause favorably placed on the list, and we have next to deliver briefs. Mr. Matthews, Q. C., whom we have taken the precaution to retain two months ago, lodges as usual in the quiet abode of the widow Dunn (all hotels are, or were, at the time of which we are speaking, tabooed to the barristers on circuit), and there we deposit his bulky brief, with its little indorsement:

"Mr. Matthews, Q. C. . . 50 quas.[1]
Consult'n, ... 5 quas.

55 quas.

With you:

Mr. Dryasdust,
Mr. Pepperemwell."

The other briefs vary only in the lesser amount of the fees marked thereon, and are similarly left at the learned gentlemen's respective lodgings, and now we are free for the day. Mr. Matthews is expected down about six o'clock in the evening, and before the morning he will have to read perhaps a dozen briefs, one or two of which, like our own, may consist of 150 pages of closely written matter, and involve much analysis of dates and facts. To a stranger, the rapidity of apprehension, which the English system of instructing counsel at the last moment produces in the average barrister, seems almost incredible; but there is an equally striking result flowing from the division of the profession into two branches which is not so obvious to outsiders, but must be well known to all, who, as solicitors, have had the task of preparing cases for trial, and have subsequently heard them tried. It is this—that very seldom indeed do counsel present and handle a case in the manner and from the point of view anticipated by the solicitor. The bringing a new mind to bear upon the case almost always results in the case being placed in a fresh light, in the discarding of a host of minor points, and in the battle being lost or won on the real hinges of the matter. The solicitor's careful mind has provided for every contingency, and prepared every detail, and had he to argue his case himself he would be far more prolix, and consequently less forcible than the barrister. This is, we think, the true advantage of the English dual system, and we are bound to say, after some experience of the American plan, that we still give the preference to the old way.

But we must not longer digress. Let us imagine the afternoon and night past, and the day of actual work arrived. Consultation is fixed for half past eight sharp at our leader's chambers, and there accordingly we go and meet Mr. M., and his two juniors. The keen hard lawyer receives us with dignified courtesy. He says little and the consultation does not last ten minutes, but we have had sufficient experience of counsel to know from the little he does say that he has read his brief, a thing by no means to be taken for granted. Mr. Pepperemwell, a pert little dandy with an eyeglass, evidently stayed too late at the county ball last night and has seen nothing of his brief, except the outside, but by the time the case is called he will have picked up enough to vigorously cross-examine one or two weak witnesses on the other side and this is all we expect from him. As for Dryasdust a reliable thorough old lawyer, not showy, but true, he has previously drawn the pleadings, and ad-

[1] "Quas," guineas.

vised on evidence and consequently knows the case almost as thoroughly as we do ourselves.

Entering the civil court, we find ourselves in a large square hall one side of which is occupied by the bench, whilst round the other walls are ranged rows of highbacked, uncomfortable pews, gradually descending as in a class room. The centre space or pit immediately beneath the judge is filled by a large baize covered table, round which sit the members of the bar in lively conversation, the sedateness of their wigs and the vivacity of their countenances forming as odd a contrast as their talk in which racing and law, politics and scandal jostle for predominance. As the judge's door opens, silence instantly obtains, and Manisty J., a quiet slow old man, as yet blissfully ignorant of the Adams-Coleridge case, takes his seat and begins work. In those days Manisty was considered an exceptionally good lawyer, but weak in his appreciation of facts and wanting in capacity for business. In an appeal court he might have made a reputation—at *nisi prius* he was lost.

We need not recapitulate the various proceedings of an assize trial which differs in little, but its surroundings from an American trial by jury. There is more form and circumstance amongst the Englishmen, but there is also much more rapid despatch of business. Everybody is in a hurry, for the time allotted to the assize is quite inadequate to the proper trial of the causes set down. Out of the sixteen on the list, probably seven or eight will be tried out, and, of the rest, some will be settled, others sent to a reference and two or three made *remanets* for Gloucester, at which city, being the last place in the circuit, the judges can sit indefinitly and clear off the arrears of the whole circuit. This, of course, applies only to the civil business. On the criminal side, the judge must make a complete jail delivery before leaving each town, no matter how long it takes him or how the other appointments of the circuit are deranged.

As our case is not reached on the first day, we have still to stay over, and, indeed, we are in no very great hurry to get away, for we are pleasantly lodged in an old-fashioned, homely hotel, and there is sure to be a race meeting, a country cricket match, or regatta or some kind of festival going on at assize time, not to mention the minor attractions of the theater, refreshingly provincial, or the glee club. This last institution deserves, at least, a passing notice. From time whereof the memory of man runneth not to the contrary, the singing men of the cathedral have been accustomed to meet in a tavern once a week and there sing glees and catches together. These meetings are now held in the large hall of an ancient inn and here on the usual night, the good burghers of Worcester are wont to assemble, smoking their long pipes, drinking their clear red ale or fragrant whiskey and listening to those cheerful old madrigals and glees which are the most truly, national music England can boast and which seems never to lose their charm. Long may the good old custom be kept up, not for the sake of gain, for not one copper do the singers receive, but as a living mark of that mild and tolerant feeling which is hereditary with the ecclesiastics of Worcester.

But the pleasantest holiday must end. On third and last day our case is reached, fairly well tried and a special verdict taken, The judge orders the legal points, which are intricate, to be argued before him in London after the circuit is closed, and suspends till then the entering up of judgments. This means more briefs, more fees and considerable delay, but, as our client happens to be a corporation, we do not feel that extreme disgust at the result, which our friend Jones, the solicitor on the other side, vigorously expresses. The judge may be, as he says, an old woman—he may even be right when he calls the barristers sharks, but our corns are not trodden on and why should we grumble? Anyway, the Assize is over and we have only to pay our reckoning at our inn and go home.

A. B. M.

STATUTORY BONDS WITH ADDITIONAL UNDERTAKINGS.

GEORGE A. RUBELMAN HARDWARE CO. v. GREVE.

St. Louis Court of Appeals, May 19, 1885.

BONDS, STATUTORY.—[*Injunction Bonds.*]—*Additional Clauses Deemed Surplusage.*—Where a bond given in pursuance of a statute and to effectuate a statutory purpose merely, contains additional covenants not required by the statute, it will not be com-

petent for the obligee to disregard the statutory covenants and to bring an action to enforce the additional covenants merely. These latter are undertakings without legal consideration, and are hence mere surplusage. So held of a bond given for an injunction under the Missouri statute.

Appeal from the Circuit Court of the City of St. Louis.

LEWIS, P. J., delivered the opinion of the court:

This is a suit upon a penal bond, whose condition is thus set forth: "The condition of the above obligation is such, that, whereas G. H. Greve, on the thirtieth day of August, A. D. 1882, obtained a restraining order or injunction against Isaac M. Mason and Geo. A. Rubelman Hardware Company. Now, if the said G. H. Greve shall pay all damages that may be occasioned by said restraining order or injunction and abide the decision which shall be made therein, and pay all sums of money, damages and costs, that shall be adjudged against him if the injunction or restraining order be dissolved, then the above obligation to be void, otherwise to be and remain in full force and virtue." The stipulation that the obligor "shall pay all damages that may be occasioned by said restraining order or injunction," is not found in Rev. Stat. Sec. 2710, which provides for the giving of injunction bonds, but the other stipulations are strictly what the statute prescribes. The only breach assigned in the petition is upon the stipulation which does not appear in the statute. There was a judgment for the plaintiff. The question brought up by the appeal is, whether an action is maintainable on the breach alleged?

The argument for defendants stands upon the general proposition that, where a statutory bond contains stipulations additional to those prescribed by statute, such additional stipulations are nullities, and rests upon the authority of Dorris v. Carter, 67 Mo. 544, as having established this rule in Missouri. It is difficult to understand why the citation is so relied upon. In the whole report of that case, there is not a word about the effect of an extra-statutory condition in a statutory bond. The bond there sued on is described as "a statutory injunction bond," and does not appear to have contained any but the statutory conditions. The court found that not one of these was shown to have been broken, and that the pretended breach did not fit the stipulations. The decision has not the least relevancy to any question in the present case.

As a general proposition, all parties have a right to agree, in the form of a penal bond, or otherwise, upon any undertaking which is not prohibited by positive law, or forbidden by public policy. It is the leading function of civil courts to enforce all such undertakings, as far as practicable, whenever called upon by aggrieved contracting parties. This fundamental principle furnishes the key to numerous adjudications which hold that a bond given in aid of a statutory proceeding may depart from the statutory form, and yet be a good common law bond; and to say that it is a good common law bond, means nothing more than that it binds the obligor to a lawful act, and is not lacking in the essentials of mutuality and sufficient consideration. Thus, in Barnes v. Webster, 16 Mo. 265, Scott, J., says: "All bonds, though voluntary, if they do not contravene public policy, nor violate any statute, are valid and binding on the parties to them." As to what constitutes a voluntary bond, it is apparent that a bond given in conformity with a statute, so as to effect a contingent statutory purpose, is not voluntary, because the obligor is compelled to give it, in order to secure a remedy or a right. But if the bond, although intended for a statutory object, be not such as the statute requires, it is to that extent voluntary, and is enforceable or not, according to common law principles; subject, of course, to any direct statutory restriction. Such a restriction may be found in cases where the statute expressly prohibits certain conditions in a bond, or declares that a bond taken in any form other than the one prescribed shall be void. It was held in Grant v. Brotherton, 7 Mo. 458, that "A bond given under a statute, but not following the words used in the act, is nevertheless valid; unless the statute prescribes a form, and declares that all bonds not taken in the prescribed form shall be void." Said Judge Napton: "But there is no objection to a bond taken under the statute of this State, if it be a good bond between the parties at common law, and no conditions are prescribed which are prohibited by statute." The State *ex rel* v. O'Gorman, 75 Mo. 370, was the case of an official bond which did not contain all the statutory conditions. Said Norton, J.: "It is also insisted that the bond sued upon is not sufficient to bind defendants because it does not contain all the conditions prescribed by the statute. Conceding the bond not to be good as a statutory bond, the conclusion drawn from this fact by counsel by no means follows. If not good as a statutory bond, being voluntary, it is nevertheless good as a common law bond, and the parties executing it are bound by all the conditions it contains, and to the full extent of such conditions." See also, The State v. Thomas, 17 Mo. 503.

The Missouri adjudications supposed to bear upon the present case are separable into three classes: In the first class, the bond given in aid of a statutory proceeding either does not contain all the conditions for which the statute provides, or else, while containing all those conditions, is burdened with some additional ones not provided for in the statute. But in every case of this class, the suit is founded upon a breach of one or more of the statutory conditions expressed in the bond. The condition is justly enforced against the obligor, since he has realized the advantages of a proper statutory bond, and cannot now be heard to deny his amenability to the resulting common law as well as statutory obligation. Grant v. Brotherton, 7 Mo. 458. State v. O'Gorman, 75 Mo. 378. Flint v. Lumpkin, 70 Mo. 225.

In the second class may be placed cases wherein the bond is given in connection with judicial proceedings, but not in a State court, and is therefore not in any sense a Missouri statutory bond, however nearly it may resemble one in form or contents. In such matters, the Federal courts are not bound by State statutes, and a bond required or taken before such a tribunal cannot be regarded in State courts otherwise than as a common law obligation; so that all its conditions will be enforced, unless violative of some rule of law. Barnes v. Webster, 16 Mo. 265. Wash v. Lackland, 8 Mo. App. 122.

The third class comprises cases wherein, by reason of a change in the name of the obligee, or some other radical departure which takes the bond wholly out of the statute, it becomes, as it were, an independent obligation; and will be governed by common law principles of interpretation. In these cases also, the obligors have secured the benefits for which their promises were given, and the conditions sought to be enforced are in violation of no law or rule of public policy. Gathwright v. Callaway Co., 10 Mo. 666; State v. Thomas, 17 Mo. 503; Henoch v. Chaney, 61 Mo. 132; Wood v. Williams, 61 Mo. 63.

The case we have now to determine belongs to no one of these classes. It is the first of its kind that has appeared in the appellate jurisdictions of Missouri. It is exceptional in the fact that, while the bond sued on is legitimately statutory, and has effected its statutory purpose, it is not here proposed to enforce a statutory condition. All the cases show that the interpolation of extra-statutory conditions will not modify the force of a statutory bond, or impair the efficacy of its statutory stipulations. But that an extra-statutory stipulation in such a bond may be enforced alone, is quite another proposition. The statute offered to the obligor a restraining order upon certain conditions, and subject to certain consequences in specified contingencies. The terms of the present bond subject him to a condition not imposed by the statute, and this action seeks to fix upon him consequences which were not suggested in the statutory proposal, and which curtail its benefits in a way not warranted by the law. Such a condition is contrary to the manifest policy of the law, and is therefore void. If the obligor has realized the benefits for which the bond was given, he has, in the statutory undertakings, supplied the whole consideration for them which the law exacted. It is as if A should direct his servant to sell a piece of property to B for a certain price. The servant puts an advance upon the price for his own benefit, and pockets the difference. This is no less a fraud on the intentions of A, because B was willing to pay the excess. The extra-statutory undertaking is without any consideration which the law will recognize. Precedent and authority are not wanting for these conclusions. "When a bond is taken under a statute, it ought to conform in substance to the requisitions of the law; and if it goes beyond the law it is void, so far as it exceeds those requisitions." Armstrong v. United States, 1 Peters C. C. 46. "Where a statute requires an official bond, and prescribes substantially the terms of it, it must conform to the requisitions of the statute; and if it goes beyond them it is void, so far at least as it exceeds those requisitions." United States v. Howell, 4 Washington, 620. "But where the statute only directs the condition of the bond, and does not avoid it if it should not conform to the directions, and something more than that condition is added to it, the bond may be allowed to cover the authorized part of the condition, and so much may be recovered under it, and no more." United States v. Brown, Gilpin, 179. "A bond may, by mutual mistake or accident, and wholly without design, be taken in a form not prescribed by the act. * * * Where the act speaks out, it would be our duty to follow it; where it is silent, it is a sufficient compliance with the policy of the act, to declare the bond void, as to any conditions which are imposed upon a party beyond what the law requires. This is not only the dictate of the common law, but of common sense. We think, then, that the present bond, so far as it is in conformity to the act, * * * is good; and for any excess beyond that act * * * it is void, *pro tanto*." United States v. Bradley, 35 United States, 364.

The judgment must be reversed, and the cause dismissed. All the judges concur.

NOTE.—It is believed that the cases cited in the last paragraph of the foregoing opinion are the only American cases which bear on the precise point involved. The opinion may, therefore, be said to "annotate itself."—ED. C. L. J.

STATE REGULATION OF INSURANCE COMPANIES.

CHICAGO LIFE INSURANCE CO. v. NEEDLES.

Supreme Court of the United States, March 2, 1885,

1. JURISDICTION. [*U. S. Supreme Court.*]— *In Cases of Writs of Error to State Courts.*—The jurisdiction of the Supreme Court of the United States under a writ of error to a State court, is not ousted by the fact that the Federal question involved in the case was not passed upon by the State court, provided that it was necessarily involved in the judgment of such court; nor by the fact that the decision of the United States Supreme Court upon the question is in affirmance of the judgment of the State court.

2. ——. ——. *Limitations upon Exercise of this Jurisdiction—Evidence in State Court not Reviewed.*—In exercising such a jurisdiction the Supreme Court of the United States is limited to the specific inquiry whether the particular statute upon which the judgment of the State court rests, infringes any right secured by the National Constitution, it is not competent for it to inquire whether the State court has so inter-

preted the evidence as to render a judgment which infringes some constitutional right of the plaintiff in error.

3. CONSTITUTIONAL LAW. [*Police Regulations.*] *State Statutes Regulating Insurance Companies not Unconstitutional.* — The statutes of a State imposing reasonable regulations upon the business conducted by insurance companies incorporated and existing within the State, and providing for their compulsory winding up in the event of threatened insolvency or misuser of their franchises, do not impair the obligation of the contract between the State and such companies, created by charter granted by the State to such companies and accepted by the latter prior to the passage of such statutes. Such statutes do not infringe any rights secured by the National Constitution, but are, on the contrary, reasonable police regulations.

In error to the Supreme Court of the State of Illinois.

HARLAN, J., delivered the opinion of the court:

By an act of the General Assembly of Illinois, approved February 16, 1865, certain named persons were created a body politic and corporate by the name of the Traveler's Insurance Company, with authority to carry on the business of insuring persons against the accidental loss of life or personal injury sustained while traveling by railways, steamers, and other modes of conveyance. Subsequently, by an act approved February 21, 1867,—the provisions of which were formally accepted by the company—its name was changed to that of the Chicago Life Insurance Company, and it was invested with power to make insurance upon the lives of individuals, and of persons connected by marital relations to those applying for insurance, or in whom the applicant had a pecuniary interest as creditor or otherwise; "to secure trusts, grants, annuities, and endowments, and purchase the same, in such manner, and for such premiums and considerations as the board of directors or executive committee shall direct." That, as well as the original act, was declared to be a public act, to be liberally construed for the purposes therein mentioned.

A general law of the State, approved March 26, 1869, and which took effect July 1, 1869, entitled "An act to organize and regulate the business of life insurance," provides (§ 10): "When the actual funds of any life insurance company doing business in this State are not of a net value equal to the net value of its policies, according to the 'combined experience,' or 'actuaries' rate of mortality, with interest at four per centum per annum, it shall be the duty of the auditor to give notice to such company and its agents to discontinue issuing new policies within this State until such time as its funds have become equal to its liabilities, valuing its policies as aforesaid. Any officer or agent who, after such notice has been given, issues or delivers a new policy from and on behalf of such company before its funds have become equal to its liabilities as aforesaid, shall forfeit, for each offense, a sum not exceeding one thousand dollars." The same statute requires, among other things, every life insurance company incorporated in Illinois to transmit to the auditor, on or before the first day of March, in each year, a sworn statement of its business, standing, and affairs, in the form prescribed or authorized by law and adapted to its business; empowers that officer to address inquiries to any company in relation to its doings or condition, or to any other matter connected with its transactions, to which it was required to make prompt reply; and makes it his duty to make, or cause to be made, an examination of its condition and affairs, whenever he deems it expedient to do so, or whenever he has good reason to suspect the correctness of any annual statement, or that its affairs are in an unsound condition. The provisions relating to life insurance companies, incorporated in other States, and doing business in Illinois need not be here examined, or their effect determined.

By another general statute, approved February 17, 1874, in force July 1, 1874, it is provided as follows:

"SEC. 1. If the Auditor of State, upon examination of any insurance company incorporated in this State, is of the opinion that it is insolvent, or that its condition is such as to render its furthur continuance in business hazardous to the insured therein, or to the public, or that it has failed to comply with the rules, restrictions or conditions provided by law, or has exceeded, or is exceeding its corporate powers, he shall apply by petition to a judge of any circuit court of this State to issue an injunction, restraining such company, in whole or in part, from further proceeding with its business, until a full hearing can be had, or otherwise, as he may direct. It shall be discretionary with such judge, either to issue said injunction forthwith, or to grant an order for such company, upon such notice as he may prescribe, to show cause why said injunction should not issue, or to cause a hearing to be had on complaint and answer, or otherwise, as in ordinary proceedings in equity, before determining whether an injunction shall be issued. He may in all such cases make such orders and decrees, from time to time, as the exigencies and equities of the case may require, and in any case, after a full hearing of all parties interested, may dissolve, modify or perpetuate such injunction, and make all such orders and decrees as may be needful to suspend, restrain or prohibit the further continuance of the business of the company."

"SEC. 5. When [the] charter of any such insurance company expires, is forfeited, or annulled, or the corporation is restrained from further prosecution of its business, or is dissolved, as hereinbefore provided, the court, on application of the auditor, or of a member, stockholder or creditor, may, at any time before the expiration of said two years, appoint one or more persons to be receivers, to take charge of the estate and effects of the company, including such securities as may be deposited with the Auditor or Treasurer of State, and to collect the debts due, and property belonging to it, with power to prosecute and defend suits in the name of the corporation, or in their own names, to appoint agents under them, and do all other acts necessary for the collection, marshaling and distributing of the assets of the company, and the closing of its concerns; and, when necessary for the final settlement of its unfinished business, the powers of such receivers may be continued as long as the court deems necessary therefor."

"SEC. 9. The mode of summoning parties into court, the rules of practice, course of procedure, and powers of courts, in cases arising under this act, shall be the same as in ordinary proceedings in equity in this State, except as herein otherwise provided."

Under the authority conferred by the latter statute the auditor caused an examination to be made, by the chief clerk of the insurance department of the State, into the condition of this company. That officer reported that it had been doing a losing business for several years, was insolvent within the meaning of the statute, and that immediate steps should be taken to appoint a receiver, to the end that the affairs of the company be wound up as quickly as possible, as being for the best interests of its policy-holders. As the result of that examination, the present proceedings were commenced by the auditor in the Circuit Court of Cook County under the said act of 1874. The petition filed by him shows that, in his opinion, the condition of the company rendered its further continuance in business hazardous to the insured. He prayed that the company be enjoined from further prosecuting its business; that a receiver be appointed to take charge of its real estate and effects; and that such other relief be granted as should be meet. An injunction was issued, and a receiver appointed, with authority to take possession of the property of the company, the latter being directed to execute all conveyances necessary to vest in him full title to all its property, assets and choses in action. The company, by its answer, put the plaintiff on proof of all the material allegations of the petition. At the final hearing, it moved the court, upon written grounds, for a final decree in its behalf; one of which was, that the statutes of the State, under which these proceedings were had, were in violation of the Constitution of the United States, in that they impaired the obligation of the contract between the State and the company, as well as of the contracts between the company and its policy-holders and creditors.

This motion was denied, and a final judgment rendered perpetually enjoining the company from further prosecution of its business. From that judgment a writ of error was prosecuted to the Supreme Court of the State, where, among other things, was assigned for error the refusal of the court of original jurisdiction to adjudge that the said statutes of Illinois were in violation of the Constitution of the United States. The judgment of the inferior court was, in all things, affirmed by the Supreme Court of the State, and from that judgment of affirmance the present writ of error is prosecuted.

The Supreme Court of Illinois did not, in terms, pass upon the claim distinctly made there, as in the court of original jurisdiction, that the statutes in question were in derogation of rights and privileges secured to appellant by the Constitution of the United States. But the final judgment necessarily involved an adjudication of that claim; for, if the statutes upon the authority of which alone the Auditor of State proceeded, are repugnant to the National Constitution, that judgment could not properly have been rendered. This court, therefore, has jurisdiction to inquire whether any right or privilege protected by the Constitution of the United States, has been withheld or denied by the judgment below. And our jurisdiction is not defeated, because it may appear, upon examination of this Federal question, that the statutes of Illinois are not repugnant to the provisions of that instrument. Such an examination itself involves the exercise of jurisdiction. The motion to dismiss the writ of error upon the ground that the record does not raise any question of a Federal nature must, therefore, be denied.

The case upon the merits, so far as they involve any question of which this court may take cognizance, is within a very narrow compass. The main proposition of the council is that the obligation of the contract which the company had with the State, in its original and amended charter, will be impaired, if that company be held subject to the operation of subsequent statutes, regulating the business of life insurance and authorizing the courts, in certain contingencies, to suspend, restrain, or prohibit insurance companies incorporated in Illinois from further continuance in business. This position cannot be sustained, consistently with the power which the State has, and, upon every ground of public policy, must always have, over corporations of her own creation. Nor is it justified by any reasonable interpretation of the language of the company's charter. The right of the plaintiff in error to exist as a corporation, and its authority, in that capacity, to conduct the particular business for which it was created, were granted, subject to the condition that the privileges and franchises conferred upon it should not be abused, or so employed as to defeat the ends for which it was established, and that, when so abused or mis-employed, they may be withdrawn or reclaimed by the State, in such way and by such modes of procedure as are consistent with law. Although no such condition is expressed in the company's charter, it is necessarily implied in every grant of corporate existence. Terrett v. Taylor, 9 Cranch, 51; Angell & Ames on Corporations (9th ed.), § 744, note.

Equally implied, in our judgment, is the condition that the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the legislature may, from time to time, prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the State has granted, and serve only to secure the ends for which the corporation was created. Sinking Fund Cases, 99 U. S. 70; Commonwealth v. Farmers' & Mechanics' Bank, 21 Pick. 542; Commercial Bank v. Mississippi, 4 S. & M. 503. If this condition be not necessarily implied, then the creation of corporations, with rights and franchises which do not be-

long to individual citizens, may become dangerous to the public welfare through the ignorance, or misconduct, or fraud of those to whose management their affairs are entrusted. It would be extraordinary if the legislative department of a government, charged with the duty of enacting such laws as may promote the health, the morals, and the prosperity of the people, might not, when unrestrained by constitutional limitations upon its authority, provide, by reasonable regulations, against the misuse of special corporate privileges which it has granted, and which could not, except by its sanction, express or implied, have been exercised at all.

In the present case it is claimed by the State that the Chicago Life Insurance Company was never solvent at any time after its original organization; that only ten per cent. of its authorized capital stock was ever paid in; that stock subscription notes, representing unpaid subscriptions, were ingeniously made payable on demand, with interest, after such demand, and that, no demand having been made, no interest accrued; that, nevertheless, the verified reports of the company to the State indicated that its capital stock was fully paid up in cash, thus leading the public and the insured to believe that the stock was paid up and invested in interest-bearing securities; that large dividends were annually paid to stockholders from the earnings of the company, which, consistently with an honest exercise of its franchises and privileges, and with its duty to policy-holders, should not have been paid; that interest upon collateral securities deposited by stockholders owing subscriptions was received by the stockholders themselves; that the annual dividends paid to stockholders was in direct violation of the company's by-laws; that the annual reports to the auditor scheduled large amounts of assets and securities as the property of the corporation, when, in fact, they were the property of individuals; that such reports falsely magnified the receipts of the company and misstated its disbursements; and that its last annual report included, among its securities, about $80,000 of mortgages which were not the property of the company. These statements, counsel for the State claim, are fully sustained by the evidence in the cause, while counsel for the company, with equal emphasis, contends that the showing made is all that could be desired in a corporation managed by careful, honest directors.

We express no opinion as to the correctness of either of these opposing views; for, they refer to matters that do not necessarily involve the validity of the statutes which, it is contended, violate the national constitution, they relate only to the manner in which the company has exercised its corporate powers, and do not involve any question of a federal nature. It is not competent, under existing laws, for this court to inquire whether the State court correctly interpreted the evidence as to the company's insolvency; nor whether the facts make a case which, under the statute of 1874, required or permitted a judgment perpetually enjoining it from doing any further business. We are restricted by the settled limits of our jurisdiction to the specific inquiry, whether the statutes themselves, upon which the judgment below rests, impair the obligation of any contract which the company, or its policy holders, had with the State, or infringe any right secured by the National Constitution. Railroad Co. v. Rock, 4 Wall., 180; Knox v. Exchange Bank, 12 *Ib.*, 383. It is only as bearing upon the question of the power of the State—without any express reservation to that end having been made in the charter of the company—to subject it to such regulations as those established by the act of 1869, or to compel it to cease doing business when the circumstances exist which are set out in the act of 1874, that we have referred to the facts which counsel for the State contend are fully established by the evidence. If the State had no such power, then the statute under which she proceeds would impair the contract which the company had with her by its charter. But can it be possible that the State, which brought this corporation into existence for the purpose of conducting the business of life insurance, is powerless to protect the people against it, when—assuming, as we must, the facts to be such as the judgment below implies—its further continuance in business would defeat the object of its creation, and be fraud upon the public, and on its creditors and policy-holders? Did the company, by its charter, have a contract that it should, without reference to the will of the State, or the public interest, exercise the franchises granted by the State after it became insolvent and consequently unable to meet the obligations which, as a corporation, under the sanction of the State, it had assumed to its policy-holders? Our answer to these questions is sufficiently indicated by what has been said. The act of 1869 does not contain any regulation respecting the affairs of any corporation of Illinois which is not reasonable in its character, or which is not promotive of the interests of all concerned in its management. It only guards against mismanagement and misconduct; its requirements constitute reasonable regulations of the business of such local corporations, it does not impair the obligation of any contract which this company had with the State; the conditions imposed upon the rights of the company to continue the issuing of policies are neither arbitrary nor oppressive.

The same general observations apply to the act of 1874, which, recognizing the contract right of the company to carry on business as a corporation, does not, by a legislative decree merely, based upon the *ex parte* representations of public officers assume to withdraw that right. There is no denial, as counsel supposes, of the equal protection of the laws, nor any deprivation of property without due process of law; for, that statute authorizes a public officer to bring the company before a ju-

dicial tribunal, which, after full opportunity for defence, may determine whether it is insolvent, or its condition such as to render its continuance in business hazardous to the insured or to the public, or whether it has exceeded its corporate powers, or violated the rules, restrictions or conditions prescribed by law; grounds which, if established, constitute sufficient reason why the corporate franchises and privileges granted by the State should be no longer enjoyed. Terret v. Taylor, *ubi supra*; 2 Kent's Com. 304, 312; Slee v. Bloom, 5 Johns. Chy. 379; Com. v. F. & M. Bank, 21 Pick. 542. See also Angell & Ames on Corporations, § 774 and note, 9th Edi. That a suit, for such purposes, might be instituted if, in the opinion of the auditor of State, any of those grounds existed, affords no justification to characterize this proceeding as harsh or arbitrary; for, at last, the final judgment of the court must depend upon the facts as established by competent evidence, and not upon the mere opinion of that officer. Indeed, the existence of such an opinion, upon the part of that officer, as a condition of his right to institute the proceedings prescribed by the act of 1874, is in the interest of the corporations embraced by its provisions; for it furnishes some protection against hasty or oppressive action against them.

These views are strengthened by the company's acceptance of the amended charter granted in 1867. The fifth section of that act is in these words: "This act and the act to which this is an amendment shall not be deemed to exempt said company from the operation of such general laws as may be hereafter enacted by the General Assembly on the subject of life insurance." That section may not be equivalent to a reservation of the right of the legislature to alter, amend, or repeal the original charter at pleasure; and, if it be admitted that the company, prior to that amendment, could not have been subjected to the regulations prescribed by the acts of 1869 and 1874, yet it was entirely competent for it to waive—as, by its acceptance of the amended charter, it did waive—any such exemption, and, in consideration of the grant of additional powers, or without any consideration of that character, agree to come under the general laws on the subject of the business in which it was engaged, which did not materially impair its right to carry on that business, or take from it any substantial privilege conferred by the original charter. It took the additional rights given by the act of 1867, subject to the condition imposed by its fifth section.

It is further contended that the State enactments in question impair the obligation of the contracts which the company has made with its creditors and policy-holders. To this it is sufficient to reply, in the language of this court in Mumma v. Potomac Co., 8 Peters, 283, where it was said: "A corporation, by the very terms and nature of its political existence, is subject to dissolution by surrender of its corporate franchises, and by a forfeiture of them for wilful misuse and non-use. Every creditor must be presumed to understand the nature and incidents of such a body politic, and contract with reference to them. And it would be a doctrine new in the law, that the existence of a private contract of the corporation should force upon it a perpetuity of existence contrary to public policy, and the nature and objects of its charter." The contracts of policy-holders and creditors are not annihilated by such a judgment as was rendered below; for, to the extent that the company has any property or assets, their interests can be protected, and are protected, by that judgment. The action of the State may or may not have affected the intrinsic value of the company's policies; that would depend somewhat on the manner in which its affairs have been conducted, upon the amount of profits it has realized from business, and upon its actual condition when this suit was instituted; but the State did not, by granting the original and amended charter, preclude herself from seeking, by proper judicial proceedings, to reclaim the franchises and privileges she had given, when they should be so misused as to defeat the objects of her grant, or when the company had become insolvent so as not to be able to meet the obligations which, under the authority of the State, it had assumed to policy-holders and creditors.

The whole argument in behalf of the company proceeds upon the erroneous assumption that this court has authority to determine whether the facts make a case under the statutes of 1869 and 1874, and if it be found they did not, that it must enforce the right of the company to continue in business, despite the final judgment to the contrary by the courts of the State which created it; whereas, we have only to inquire whether the statutes in question impair the obligation of any contract which the company has with the State, or violate any other provision of the national constitution. Being of opinion that they are not open to any objection of that character, the judgment must be affirmed without any reference to the weight of evidence upon any issue of fact made by the pleadings.

Judgment affirmed.

NOTE.—1. The right of the legislature to control the action, prescribe the functions and duties of corporations and impose restraints upon them in all matters coming within the general range of legislative authority, is as full as the power to legislate respecting natural persons; the only limitation is that its charter rights are contract obligations which cannot be impaired. Therp v. Rutland R. R., 27 Vt. 143. These are such only as are express, or are necessarily implied as essential to the existence and operation of the corporation; the protection does not extend to these which though incidental to the beneficial use of the franchise, are not so expressed or so implied. Providence Bank v. Billings, 4 Pet. 514; Charles Riv. Bridge v. Warren Bridge, 11 Pet. 548; Therp v. Railroad *supra*. Privileges which exempt them from burdens, duties or restraints common to individuals do not flow from the charter, and must therefore be expressed in it or the

do not exist; and nothing short of the clearest language will justify the inference that the legislature intended to yield its power in that particular. Railroad v. Hecht, 95 U. S. 168; Providence Bank v. Billings *supra*; Granger Cases 94 U.S. 125-183; Fertilizing Co. v. Hyde Park, 97 U. S. 659; Greenwood v. Freight, 105 U. S. 13-24. "The continued existence of the government would be of no great value if by implications and presumptions it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform transferred to privileged corporations" per Taney, Ch. J., in Charles Riv. Bridge Case. Hence a charter provision prescribing the manner in which process "shall" be served on the company, will mean "may." Railroad v. Hecht, 95 U. S. 168. So where the legislature has not expressly renounced the power to fix freight and fares, or has not fixed the amount of compensation to be charged by charter provision, the right of the legislature to regulate and control the rate will not be regarded as surrendered, but continuing. Granger Cases, 94 U. S. 125-183; Ruggles v. People, 91 Ills. 256; Blake v. Winona R. Co., 19 Minn. 423. See also People v. Boston R. R., 70 N. Y. 569, where a railroad was required to build certain bridges on the line of its track over roadways.

There has been a marked tendency of late to deny that there is any contract obligation even in respect to express stipulations in the charter, where such stipulations materially control or prohibit the exercise by the State of powers necessary to sovereignty. In an early case Redfield, C. J., observed in relation to provisions exempting the corporation from taxation. "It has been questioned how far one legislature could in any manner abridge the general power of every sovereignty to impose taxes to defray expenses of public functions. Brewster v. Hough, 10 N. H. 138; Mechanics Bank v. Debolt, 1 Ohio 591; Toledo Bank v. Bond, *Ibid* 622. It seems to me there is some ground to question the right of the legislature to extinguish by one act, this essential right of sovereignty. I would not be suprised to find it brought into general doubt. But at present it seems pretty generally acquiesced in. State of New Jersey v. Wilson, 7 Cranch 164; Gordon v. Appeal Tax Court, 3 How. 133." Thorp v. Rutland, R. 27 Vt. 143. See Fertilizing Co. v. Hyde Park, 97 U. S. 671, per Miller, J. Though the binding obligation of a provision which barters away the power to tax is now settled, yet it would seem that if a power so necessary and important as that of taxation may be sold and surrendered, so also could any and every other power; and an artificial body thus created having an irresponsible character, entirely exempt from the sovereignty creating it. That such an application of the ruling of the Dartmouth College Case was never intended seems apparent from the language of the great chief justice: "That the framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed may be admitted." 4 Wheat. 518, 629. The views expressed by Judge Redfield in regard to taxation have been enforced recently by the Supreme Court of the United States in relation to analogous powers; where it was held that the States cannot barter away any of its police powers. Stone v. Mississippi, 101 U. S. 817; Boyd v. Alabama, 94 U. S. 645; Beer Co. v. Massachusetts, 97 U. S. 26; Com. v. Bird, 12 Mass. 443; Metropolitan Board v. Barrie, 34 N. Y. 657; Kans. Pac. Ry. v. Mower, 16 Kans. 573; Portland v. Railroad, 65 Me. 122.

2. The mere fact that a Federal question is involved in the case and has been erroneously decided by the State court does not give jurisdiction to United States Supreme Court to examine every question of law or fact which the record may present. For if so, the Federal court would have power to absorb the functions of the State judiciaries. The Federal court examines other points in the record only after ascertaining that a Federal question is involved and has been erroneously decided, and then the examination of the other points is not for the purpose of ascertaining whether the State court has correctly decided them, but to ascertain whether they may not be sufficient in themselves to maintain the judgment, notwithstanding the error respecting the Federal question. Murdock v. City of Memphis, 20 Wall. 614; Klinger v. Missouri, 13 Wall. 257; Kennebeck R. R. v. Portland, 14 Wall. 23; McManus v. O'Sullivan, 91 U. S. 578; Bollinger v. Lersner, 91 U. S. 594. But if it be found that the issue respecting the Federal question is of such controlling character that its correct decision is necessary to any final judgment in the case, or if there has been no decision by the State court on any matter or issue sufficiently broad to maintain the judgment, the court will decide the case purely on the Federal question. Murdock v. Memphis, 20 Wall. 614. If the Federal right alleged to have been denied by the State court, depends upon the establishment of error in the decision of the State court in respect to general municipal law, either common or statutory, of the State, the Federal court will not review the judgment of the State court in respect to such error, and no Federal question will be deemed to be involved. Thus, where the United States claimed priority of payment of a debt, and the State court held that the debt had been paid; the Federal court has no jurisdiction to review the question decided. U. S. v. Thompson, 93 U. S. 586. Where the State court refuses to enforce a contract on the ground that it is void, the Supreme Court will not have jurisdiction on the ground that the obligation of contract has been impaired. Knox v. Exch. Bk., 12 Wall. 383; Railroad v. Rock, 4 Wall. 140; Robertson v. Coulter, 16 How. 106; Gill v. Oliver, 11 How. 529; Wolf v. Stix, 96 U. S. 541; Brown v. Colorado, 106 U. S. 95; Williams v. Weaver, 100 U. S. 547; Day v. Gallup, 2 Wall. 97; Delmas v. Ins. Co., 14 Wall. 661. So, also, where the judgment of the State court is based on a finding of fact. Mining Co. v. Boggs, 3 Wall. 304; United States v. Thompson, 93 U. S.; Chicago Ins. Co. v. Needles, above. But the Federal question will be considered as it comes from the State court. Malendy v. Rice, 94 U. S. 736. A judgment of reversal by the State Appellate Court is not such a judgment as will authorize jurisdiction by the Federal Court. Davis v. Couch, 94 U. S. 514; McComb v. Com., 91 U. S. 1; Williams v. Bruffy, 102 U. S. 248.

G. D. BANTZ.

WEEKLY DIGEST OF RECENT CASES.

1. CONTRACTS.—[*Legality.*]—*Agreement to Abandon Prosecution for Obtaining Money by False Representations not Unlawful.*—The obtaining of money by false and fraudulent representations is an offence which may lawfully be settled by an agreement between the parties after the institution

of a criminal proceeding. Hence a promissory note given to the prosecutor to abandon the prosecution of such an offence is founded upon a valid consideration. [Mercur, J., in giving the opinion of the court is reported to have said: "It is well settled than an agreement in consideration of stifling or compounding a criminal prosecution or proceeding for a felony or a misdemeanor of a public natere is void. (Riddle v. Hall, 3 Out. 116.) There are, however, misdemeanors of an inferior class in which the public is presumed to have less interest. They are assumed to affect chiefly the parties especially aggrieved thereby. The settlement of offences of this class is not illegal, and therefore an agreement between the offender and the party aggrieved to settle one of this kind is not invalid. Section 9 of the Act of 31st March, 1860 (Purd. Dig. 377), authorizes the magistrate or the court to which the proceedings have been returned, to permit the settlement of such offences. The obtaining of money by means of false and fraudulent representations, with intent to cheat and defraud, is an offence for which there would also be a remedy by action and may be settled. There was, therefore, no error in entering judgment for want of a sufficient affidavit of defence." Obviously this doctrine would not apply in those States where the offense is a felony.—ED.] *Geier v. Shade*, S. C. Pa. March 2, 1885; Weekly Notes of Cases, 222.

2. CORPORATION. [*President.*] — *Power of President of Corporation to Institute and Dismiss Suits.*—If a corporation, which does a large amount of business, from the character of which it must often be required to bring suits and defend suits brought against it, is in its by-laws and action of its board of directors silent as to the duties of its president, and he is left thereby entirely untrammeled, he has as one of the powers inherent in the president of such a corporation authority to take charge of its litigation and to institute and carry on suits for it and in its name and to defend suits brought against it; and in so doing he may employ counsel who may bind the corporation by their action in the suit within the ordinary power of counsel. He has also the inherent power to apply for and obtain a writ of error for the corporation and in its name; and at his pleasure he may dismiss the counsel employed by him in such case as well as the writ of error, unless restrained from so doing by some action of the board of directors. [Green, J., who delivered the opinion of the court, cited the following cases in support of these views: First National Bank of Wellsburg v. Kimberland, 16 W. Va. 555; Smith v. Lawson, 18 W. Va. 222,-229: Hodges Ex'or. v. First National Bank of Richmond, 22 Grat. 58; Savings Bank of Cincinnati v. Berton, 2 Metc. (Ky.) 240; American Insurance Company v. Oakley, 9 Paige 496; Munford v. Hawkins, 5 Denio 355; Alexandria Canal Company v. Swann, 5 How. (U. S.) 83; Chamberlain & Churchhill v. Mammoth Mining Company, 20 Mo. 96. The learned judge also commented upon the following cases: Ashadot Man. Co. v. Marsh, 4 Cush. 507; McMurry v. St. Louis Oil Man. Co., 33 Mo. 375: Chamberlin v. Mammoth Mining Co., 20 Mo. 96; Smith v. Smith, 62 Ill. 493.] *Colman v. West Va. Oil etc. Co.*, W. Va. 148 (Adv. Sheets.)

3. ———. [*Vice-President.*]— *Vice-President after Death of President, may Exercise all of his Power.*—When a vacancy occurs by death in the office of president of a corporation, the vice-president may act in his stead and perform the duties, which devolved on the president, though the law, under which the corporation was organized, did not mention the office of vice-president, but after providing for certain officers authorized the company to create other offices, and it did accordingly create the office of vice-president. Such a vice-president after the death of the president possesses all the inherent powers of the president; and if he had the inherent power to take charge of the litigation of the corporation and the other inherent powers of a president named in the first point of the syllabus, the vice-president after the president's death may exercise all or any of these powers. *Ibid.*

4. ———. [*Stockholder—Negligence.*] — *Liability of a Corporation to the Holder of a Certificate of its Stock, the Endorsement upon which has been Forged.*—A corporation by issuing stock, declares to the world by its certificate that the person in whose name it stands is the holder of the number of shares which the certificate states him to be; and that it issued with the intention that it shall be so used and acted upon; and the company is thereby liable to any one who has accepted the same and acted thereon to his injury. But it is only to the extent that loss has actually been incurred through the misrepresentation made by the certificate that it will be made good.—*Metropolitan Savings Bank v. Baltimore*, Md. Ct. of App., Jan. 8, 1885; S. C. 63 Md. 6. (Adv. Sheets.)

5. ———. ———. [*Illustration.*] — *Liable for Loss Inflicted by Issuing New Certificate in Exchange for old one with Forged Endorsement.*—H, presented a certificate of Baltimore City stock for $18,-400 to a bank in said city, and requested a loan of $3500 thereon. The stock stood in the name of K., and purported to bear his endorsement for transfer. K was a minor and the indorsement was a forgery, though the bank was ignorant of both these facts. The loan was made and H gave his note therefor, and deposited the certificate with the bank as collateral security. Afterwards H requested a further loan of $6,000 upon the certificate of stock already held by the bank as collateral for the first loan. It was agreed on the part of the bank to make the additional loan, provided H would have a new certificate made out in the name of the bank to cover both loans. H received at the time $2,000 of the new amount agreed to be loaned, and also the certificate to take to the City Register to have changed into two certificates, one of which should be in the name of the bank. H took the certificate to the City Register and a certificate for $10,000, was made out in the name of the bank, and another for $8,400, in the name of the original holder. On the receipt of the new certificate the bank gave H the balance of the $6,000 agreed to be loaned. At the same time the whole indebtedness was consolidated; the old note for $3,500 was surrendered, and a new note was taken for $9,500. Subsequently a further loan of $500 was made upon the new certificate, and still later the bank bought the certificate outright and surrendered the note for the loans. The question arising in equity between the bank and the city, upon the discovery of the forgery, as to which should bear the loss, it was *held:* 1. That to the extent of the advances actually made before the ten thousand dollar certificate was issued, the bank having confided wholly in the genuineness of the indorsement and the truthfulness of the statements of H in respect to the matter, the city was in no way responsible for the negligence of the bank in that regard. 2. That the city was negligent in not requiring certain proof that the transfer was genuine before it cancelled the old and

issued the new certificates; but the bank had no equity as against the city to the extent of the loans previously made, unless the city's action induced the bank to put itself in a worse position than it already occupied, of which there was no proof. 3. That the city was answerable for the subsequent advances made upon the faith of the new certificate. 4. That the surrender of the first note by the bank and its taking a new note, including both the original and the subsequent loans, did not make the first loan a new one, and the bank ought not to be allowed thereby to escape the consequence of its original negligence. 5. That the city could not escape its liability on account of the loans made by the bank subsequent to the issue of the new certificate, and on account of the subsequent purchase of said certificate by the bank, on the ground that H was the agent of the bank to receive the transfer, there being nothing to connect the bank with the deception practised upon the city. 6. That the bank was entitled to be reimbursed the actual amounts paid by it upon the faith of the new certificate, with interest thereon, from the date such sums were paid respectively, less, however, the interest on the certificate paid to it by the city, prior to the discovery of the forgery. [Citing and applying Brown v. Howard Fire Ins. Co., 42 Md. 384; Hamilton v. Central Ohio R. Co., 44 Md. 551.] *Ibid.*

6. ENLISTMENT OF MINORS. [*Habeas Corpus.*] — *When False Affidavit of Minor as to Age will Prevent Relief.*—A minor who, at the time of his enlistment in the army, made an affidavit that he was twenty-one years of age, will not be discharged on *habeas corpus*, solely on the ground of his minority and the want of consent of his guardian, on his own petition. In so holding, Dundy, J., said: "There is nothing in the laws of the United States that makes it unlawful for a minor over eighteen years of age to enlist in the army. He is certainly competent to make such a contract under some, though possibly not under all, circumstances. If the natural guardians—that is, the parents—be living, they are entitled to the services and the custody of the minor until he attains his majority. If the natural guardians are dead, and a lawful guardian exists, he is also entitled to the custody of his ward until he attains his majority. Hence it is that the law requires the written consent of parent or guardian to the enlistment of a minor, in order to make it valid. But this limitation on the right of minors to enlist, applies only to those who have a parent living, or who have a lawful guardian at the time of the enlistment. A minor eighteen years old can, undoubtedly, make a valid contract of enlistment, binding on all concerned, if he has neither parent nor guardian at the time of making such contract. When Congress revised the laws, it recognized the right of the parents to the custody, service, and control of their minor children, and the right of guardians to the custody and control of their wards; and if either see proper to exercise such control they cannot be deprived of the right to do so in such cases without they give their written consent for the enlistment of minor or ward. It is possible that this right may be asserted and maintained at any time during the existence of the minority or guardianship, if the party entitled to the custody of the minor or ward makes proper application therefor. But it seems to me that this law was made for the exclusive benefit of parents and guardians, so as to the better enable them to perform the parental or guardians' duty. This they might not be able to do if the minor or ward owed obedience to another authority. The same reason does not apply to the minor or ward; and, so far as he is concerned, especially in this and similar cases, I can see no good reason for holding that a contract of enlistment, made under such circumstances, must be declared absolutely void as against the party enlisting, though it may be so as against the parents or guardian, if no written consent be given for the enlistment. The guardian does not here seek the custody and control of his ward. It is the ward who comes into court and asks to have declared absolutely null and void his own deliberate act and deed, after he had stood by the same for more than eighteen months. This, I think, cannot be done; more especially when the enlistment was one of the very fairest, and when the recruit swore positively that he was twenty-one years old at the time of enlistment. He was perfectly well advised of what he was doing when he made the oath, as he himself admitted on this hearing. He must not be permitted to take advantage of his own wrong under such circumstances, nor to stultify himself in such an unusual manner."] *United States ex rel. v. Gibbon*, U. S. Dist. Ct. Nebr., April 8, 1885; 24 Fed Rep. 135.

7. EMINENT DOMAIN. [*Exemplary Damages.*] — *Railway Company Entering upon Land in Bad Faith Liable to Exemplary Damages.*—Where a railway corporation does not exercise its statutory right of eminent domain in good faith, punitive damages may be assessed against it. [This was an action of trespass *quare clausum fregit* by Cornelius Scully against the Pittsburgh, Chartiers, and Youghiogheny Railway Company, for damages for entering on plaintiff's land, destroying stone quarry, etc. On the trial, before Ewing, P. J., the following facts appeared: Plaintiff was the owner of a farm, upon which he operated a stone quarry, distant about two hundred feet from the line of defendant's track. Defendant proposed to buy stone of plaintiff from this quarry, but the parties could not agree upon terms. Thereupon defendant purchased a small piece of land adjoining and immediately in rear of plaintiff's quarry, notified him of its intention to lay a side track or switch through his land for the purpose of taking out stone from its land, and tendered him a bond in $1500 with sureties conditioned for the payment of damages. Plaintiff refusing to accept the bond, after notice, defendant presented the same for filing in the Common Pleas No. 1, of said county. Thereupon plaintiff filed exceptions, and at the same time filed a bill in equity averring that defendant was not about to exercise its statutory powers in good faith, etc., but that the entry was for the purpose of taking plaintiff's stone, etc., and praying for an injunction. The exceptions to the bond and motion for preliminary injunction were argued together and disposed of at the same time. The exceptions as to the amount of the bond were sustained, and it was ordered to be increased to $6,000, otherwise they were dismissed, and the motion for an injunction was refused. Under the bill and answer the parties proceeded to final hearing when the equity cause was argued upon the Master's report and proofs. The Master recommended a decre restraining the defendant in accordance with the prayer of the bill, and the decree was so entered. In the meantime, the defendant had entered on plaintiff's land, and had cut through his

quarry a way sixty feet wide, the cut being about forty feet deep at its highest point, and had removed the stone; appropriating it to its own use. There was circumstantial evidence to show that the real purpose of the entry was the appropriation of this stone. The court ruled that such a case is not different from any other case where a person commits a trespass upon the land of another in wilful disregard of his rights, in which case exemplary damages may be given.] *Pittsburgh etc. R. Co. v. Scully*, S. C. Pa., Nov. 1884; 16 Weekly Notes of Cases, 213.

8. INSURANCE, LIFE — [*Insolvency*]—*Insured not Obliged to Pay Premiums to Insolvent Company to Keep Policy in Force.*—The holder of a policy of life insurance is not bound to pay premiums to the company after it becomes insolvent, in order to keep his policy in force. [In the opinion of the court, Judge Pryor says: "It is alleged that the company had ceased to do business, and if so there was no place at which the premium could have been paid, and with the further allegation of insolvency it would have been unreasonable to have compelled the insured to pay his money year after year to an insolvent company, that is admitted by the pleadings to have been unable to comply with its contract. If the money had been paid it might have enlarged the assets so as to increase the dividend in a final distribution between those entitled, without resulting in any benefit whatever to the insured. If insolvent the amount of the seventh premium might and probably would have exceeded the amount of the dividend to which the insured would have been entitled under a distribution made by the assignee, and for this reason, if for no other, it would be unjust to require the insured to part with his money in consideration of an undertaking that could never be complied with on the part of the party receiving it. The obligation to comply with the contract of insurance was mutual, the one as much liable as the other, and the insolvency of the company was a sufficient excuse for withholding the payment by the insured. In the case of the People v. Empire Mutual Life Insurance Company, 92 New York, 105, it is said: 'The implied contract of an insurance company with its policy holders, is that it will continue to do its business, keep on hand the funds required by law for the security of its patrons, and remain in a condition so long as its contracts continue to perform its obligations, and when it fails to do this it has broken its engagements.' Here the company or the party representing it, is claiming a forfeiture by reason of the non-payment of the premium, and at the same time admitting that if the money had been paid it could not have complied with its contract. Such a defense will not be permitted in a court of equity, and the court below should have overruled the demurrer requiring the defense to make an issue, and upon a failure to do so a judgment should have been rendered for the plaintiffs. The extent of the recovery is a question not presented by the record."] *Jones v. Life Asso. of America*, Ky. Ct. of App., May 12, 1885; 7 Ky. Law Repr. 1.

9. INTERSTATE EXTRADITION. [*Jurisdiction.*]—*Of Federal Courts Concurrent with State Courts.*—The Federal and State courts have concurrent jurisdiction in cases of extradition. The judgments of the latter do not conclude the former on this Federal question, but are entitled to great respect, and are strongly advisory. *In re Roberts*, U. S. Dist. Ct., S. D. Georgia, May 5, 1885; 24 Fed. Rep. 132.

10. ———. [*Indictment.*]—*Sufficiency of Indictment under which Extradition is Claimed.*—It seems that the allegation in an indictment under which extradition is claimed that the defendant stole bonds of the Bethlehem Iron Company, without alleging the corporate character of such company, is insufficient; but the safer and better rule is to remit the question to the courts of the State in which the indictment was found. [On this point Spear, J., said: "After careful and anxious consideration of this question the court feels it to be improper, that it should discharge the defendant on this ground, and thinks it in every view safer and the better rule to remit the question of the sufficiency of the indictment to be tried and determined by the courts of the State in which it was found. The settled policy of the government being to facilitate the extradition of fugitives charged with crime, and, in view of the great importance of this policy to the commercial prosperity of the country and the integrity in business transactions between the citizens of several States, it would be a dangerous precedent, and as well in conflict with eminent authority, to hold that such matters of technical irregularity must deny the extradition."] *Ibid.*

11. ———. [*Habeas Corpus.*]—*Guilt or Innocence not Investigated on Habeas Corpus.*—In a case arising on writ of *habeas corpus*, sued out to determine the legality of an arrest under proceedings for extradition, the court cannot investigate the question as to the guilt or innocence of the defendant. *Ibid.*

12. —— [*"Fugitive from Justice"*]—*Person Going to Another State, Committing Crime and Returning is.*—One who goes into a State, and commits a crime, and returns home, is as much a fugitive from justice as though he had committed a crime in the State in which he resided and then fled to some other State. *Ibid.*

13. MASTER AND SERVANT— [*Servant's Wages*]—*Servant Employed by the Month not Entitled to Wages for the Expired Portion of the Month.*—A servant engaged by the month who is guilty of misconduct during the currency of a month which warrants his dismissal is not entitled to wages for the expired portion of the month. *Ex parte Moss*, Supreme Court of Victoria, May 12, 1885; 6 Australian Law Times, 255.

14. NEWSPAPER LIBELS.—[*Privilege.*] — *Limits of the Right to Comment upon the Character of Candidates for Office.*—Press comments in good faith, touching the character of a candidate for a particular office, so far as respects his qualifications for the particular office are privileged; beyond this the privilige of the press in commenting on the private character of a candidate does not extend. A newspaper may truthfully and in good faith point out that a candidate for the office of Mayor of a city, has been guilty of a breach of trust as administrator of a deceased person's estate, without incurring liability in a civil action for a libel. In holding thus, Mr. Commissioner Watts, in an opinion adopted by the Supreme Court of Texas, said: 'It may be asserted as a sound principle, and one supported by authority, that when a person consents to become a candidate for public office conferred by a popular election, he should be con-

sidered as putting his character in issue so far as respects his qualification for the office. [Com. v. Clap, 4 Mass., 169; Com. v. Odell, 3 Pittsburg, 449; Rearick v. Wilcox, 10 West. Jur., 681; Odgers on Slander and Libel, Sec. 236.] Whatever pertains to the qualification of the candidate for the office sought is a legitimate subject for discussion and comment, provided such discussion and comment is not extended beyond the prescribed limit; that is, all statements and comments in this respect must be confined to the truth, or what in good faith and upon probable cause is believed to be true, and the matter must be pertinent to the issue, *i. e.*, it must relate to the suitableness or unfitness of the candidate for the office. In our form of government the supreme power is in the people; they create offices and select the officers. Then, in the exercise of this high and important power of selecting their agents to administer for them the offices of government, are the people to be denied the right of discussion and comment respecting the qualification or want of qualification, of those who, by consenting to become candidates, challenge the support of the people on the ground of their peculiar fitness for the office sought? Usually it is by such discussion and comment concerning the qualification of opposing candidates that the people obtain the requisite information to enable them intelligently to exercise the elective franchise. Any abridgement of this right of discussion and comment, beyond the limitations heretofore stated, it seems to us, would be extremely unwise. And in this respect the press occupies the same position, and should be included in the same category with the people. Public journals are supported by and are published with a view to the dissemination of useful knowledge among the people, and the comments and discussions of these journals are entitled the same privileges and subject to the same limitations respecting the qualifications and suitableness of candidates for office, as those of the people. Chief Justice Willie, in Belo & Co. v. Wren, (5 Texas Law Review, 153), truly remarked 'that every facility should be allowed for the quick dissemination of useful facts, and the freedom of the press should not be restrained further than is absolutely necessary to protect private character from falsehood and slander.' It is implied by the rule announced by us that the matter published must be such as is justified by the occasion; that is, it must be such as would be appropriate for the electors to consider in making a selection for the office. Ordinarily that would be a question of fact, to be submitted to the jury by appropriate instructions. Then, if the matter published is true, and such as is justified by the occasion, there could be no recovery by the candidate against the publisher. If the matter is not justified by the occasion, then the fact that the person against whom it was directed was at the time a candidate for office, would not exempt the publisher from liability whether the matter published was true or false. And although the matter published might be justified by the occasion, still, if it was false, a right of action would accrue against the publisher to defeat which the burden would be upon him to show that the publication was made in good faith, in the honest belief of its truth, and besides that there were just and reasonable ground for entertaining that belief. While the rule here announced seems to be just to all, we are aware of the fact that it is not in accord with some, and perhaps a majority of the adjudicated cases in this country. In New York comments and discussions relating to public officers and candidates for official positions are placed upon the same footing as comments and discussions concerning the private character of other persons. The tendency in the English courts is more liberal in protecting the freedom of the press, and the holding there is in accord with the conclusions announced in this opinion and which we believe to be well founded in reason, and not merely in accord with the spirit of constitutional liberty and free republican institutions."] *Express Printing Co. v. Copeland*, S. C. Tex., June 30, 1885; 5 Tex. Law Rev. 387.

15. PARTITION—[*Conversion*]—*Sum Charged upon Land in Partition Regarded as Personalty.*—The sum charged upon land in proceedings in partition is to be regarded as personalty, and if the person in whose favor the charge is made dies before the same is paid the party or parties entitled by law to his personalty may recover the amount of the charge. [Herman, P. J., whose opinion the Supreme Court adopt, examined: Ferree v. Com., 8 Serg. & R. 312; Walters' Estate, 2 Whart. 247; Beyer v. Reesor, 5 Watts & S. 501; Hays' Appeal, 2 P. F. Smith, 449; Grider v. McClay, 11 Serg. & R. 224; Dyer v. Cornell, 4 Barr, 363; Spangler's Appeal, 12 Harris, 424; Large's Appeal, 4 P.F. Smith, 383; Sayers' Appeal, 29 P. F. Smith, 429; Kann's Estate, 19 P. F. Smith, 219; Gutshall v. Goodyear, 16 Weekly Notes of Cases, 106; Nissley v. Heisey, 28 P. F. Smith, 419.] *Barley v. Zeigler*, S. C. Pa., May 6, 1885; 16 Weekly Notes of Cases, 218.

CORRESPONDENCE.

COLLECTING DEBTS BY POSTING.

To the Editor of the Central Law Journal:

In your issue of July 10, you call upon any of your readers to give an answer to the inquiry of the attorney of the United States Merchants' Protective and Collection Association, of Covington, Ky. If you will refer back to 16 Cent. L. J., 97, under head of libel, you will find an English decision in point; and in 17 Cent. L. J., 499, under head of libel, you will find the question expressly decided by the United States Circuit Court, District Missouri, in Trussell v. Scarlett. Both these cases are in conflict with your view of the law, governing this matter, Trussell v. Scarlett decides: "When a mercantile agency makes a communication to one of its subscribers who has an interest in knowing it, concerning the financial condition of another person, and when such communication is made in good faith, and under circumstances of reasonable caution as to its being confidential, it is a protected privileged communication, and an action for libel cannot be founded upon it, even though the information given thereby was not true in fact, and though the words themselves are libelous." ***

REMARKS.—We never expressed any view of the law contrary to the above-named decisions. We deserve censure, however, for asking information of our readers, when we might have known that full information upon almost every disputed question in the law can be found in the files of this journal. We have received another letter from the correspondent of the above-named Association who first wrote to us. But we think it unnecessary to print it, or to pursue the subject further. The letter of the attorney of the Association which we printed last week vindicates it from

the aspersion which its former circular seemed to cast upon it, that of a mere collecting agent's scheme to collect doubtful or bad debts by publishing the names of alleged debtors in a list of dishonorable merchants. Of course, it is the privilege of merchants to associate for the purpose of protecting themselves against fraudulent debtors, and so long as they are careful to keep within the limits indicated in the above and the previous letter on this subject, there is nothing wrong in it, either in law or in morals.—[ED. C. L. J.

QUERIES AND ANSWERS.

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters o the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERIES.

6. I am trying to find out, from the derivation of the two names, whether *Miller* can be regarded as *idem sonans* with *Millen*. I have a case depending upon the question. JOHANNES FACTOTUM.

JETSAM AND FLOTSAM.

TO BEGIN PRACTICE.—An Oregon attorney wrote to J. W. Donovan, of Detroit, as to what State would be best to begin practice in, and received this reply: 1. Begin law in any State or city with a sense of eternal rectitude: advise every client as you would an own brother. Be in dead earnest about it. 2. Consider how completely you hold your client's interest in your hands, and how much depends on your honest judgment. Use wise discretion. 3. The law is not a mere scramble for bread money, for we are charged with the safety of property and the progress of society. Live for some object. 4. Life is a little journey, where we all hurry and many are injured and impatient, while we are called to set them right under trying conditions. Do so bravely. 5. The world will measure us by the way we do our duty, as it measures the reaper, the racer, the railway and the telephone. We must do something useful, real, and of benefit, that shall better our race, and by it we shall be known to have lived once and to have made the world better by it.

A LEGAL PUZZLE.—A learned correspondent from Flemingsbury, Ky., writes as follows: "In our last court one William Cox was tried for burglary, found guilty and sentenced to the penitentiary for four years. He is now in the penitentiary, serving out his time. Before he committed the crime of burglary it is supposed that he murdered his wife. Provided an indictment is found against him, can he be taken out of the penitentiary before his time is out and tried for murder, or will he have to serve out his time, and then be tried? The lawyers at our bar disagree. If you think the question of any interest, answer it through the JOURNAL. I have tried to look it up for my own information, but have been unable to find anything in point." This question must certainly be one which is capable of being settled by authority, and we would thank any of our learned readers to tell us how it has been settled. We should say, on principle, that he ought to be tried and, if convicted, hanged for the murder and then allowed to serve out the residue of his term for the burglary. P. S. That portion of his sentence for the burglary which would be unexpired at the time of his being hanged for the murder, might be remitted on the ground of good behavior.

NUISANCE IN HIGHWAY.—*Right of Traveller to look at the Stars if he likes.*—The practice of laying carpets or pieces of matting in front of houses in which entertainments are being given, has come under judicial notice in three recent cases tried before Lord Chief Justice Coleridge in London. In De Tyron v. Waring, the latest of the three suits, the defendant, having an entertainment at his house in Grosvenor Square, had spread a matting across the sidewalk for the benefit of his guests. The plaintiff while passing by tripped in the matting and fell down. He alleged injuries, sued for damages and obtained a verdict for $300. The following colloquy which took place between the Chief Justice and his counsel for the defendant sums up the law on the subject:—

Lord COLERIDGE—If a person puts anything across the pavement and a person stumbles over it, the owner is liable for the consequences. The passenger is not bound to look for mats on the highway. He may look at the stars if he likes.

Mr. MCINTRYE—He may run his head against a lamp-post.

Lord COLERIDGE—The lamp-post is rightfully there, but any one who has a mat or carpet spread over the pavement must take care of it.

Mr. MCINTYRE—The passenger may be guilty of contributory negligence.

Lord COLERIDGE—Possibly, but he is not bound to look for mats on the pavement, and his not looking for them is no evidence of negligence. Probably there was light enough for him to see the mat if he looked for it, but he was not bound to look for it. He may look at the stars if he pleases—if he can see them.—*Montreal Legal News.*

ACCESS TO THE COURTS.—An incident occurred before Mr. Justice Stephen which elicited from the learned judge an emphatic expression of opinion in favor of the rights of counsel to have free access to the courts of justice, and as the subject is one which has been matter of increasing complaint for some time past, it is to be hoped his lordship's opinion will be attended with beneficial results. When the present courts were first opened, it was looked upon by the legal profession as matter for congratulation that galleries were provided for the use of the public. This distinction which the architect had in view has, however, been lost sight of, and not only is it matter of daily occurrence to admit the public into the seats constructed for counsel, but the passages as well are allowed to be crowded, so that entrance on the part of those engaged in business is attended with difficulty, and instances have even occurred where barristers in robes have been refused admission altogether on the plea that the court is full. It was an incident of this nature which occurred on the 25th inst., when Mr. Willis, Q. C., who was engaged in the case before the court, found great difficulty in making his way to his seat.—Mr. Justice Stephen at once ordered the passage to be cleared, and this being done, his lordship said: I wish to express my opinion that members of the bar in their robes have a right to enter the courts, whether they are engaged in the case or not. It is a right which they have always enjoyed, and I shall see that it is enforced in every court where I sit.—Sir Hardinge Giffard, on the part of the bar, thanked his lordship for these remarks. The difficulty of access to members of the bar, he had reason to know, had been much complained of. Mr. Justice Stephen said barristers attended the courts in the exercise of their profession, and the courts should be open to them as a matter of right. There was a time in his recollection when accommodation on the same principle was provided for students.—*Law Journal* (London).